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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 526

SAM D. RAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (R. 73-78) is reported at 225 F.2d 855.

JURISDICTION

The judgment of the court of appeals (R. 79) was entered on September 21, 1955. The petition for a writ of certiorari was filed on November 18, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether lands acquired by the United States by purchase for specific governmental purposes and,

pursuant to statutory authority, devoted to such purposes, are nevertheless subject to subsequent entry under the mineral laws of the United States.

STATEMENT

This suit was instituted by the United States on March 5, 1952, to declare petitioner's purported placer mining claim to 20 acres of government land invalid, to permanently enjoin petitioner from using, occupying, or removing volcanic cinders therefrom, and for a judgment for the value of the materials already removed by petitioner. As the court of appeals observed, the facts are undisputed and, as recited in its opinion (R. 73-74), are as follows:

In 1915 a homestead patent was issued to one Stoller covering a 160-acre tract of public domain in Oregon, which tract embraced the 20-acre tract here involved. This tract, along with other privately owned lands, was reacquired by the United States in 1937 by purchase from Stoller's grantee. This acquisition was made with funds provided by the Emergency Relief Appropriations Act of 1935, 49 Stat. 115, which authorized purchase of lands to implement a broad program of retiring submarginal lands from agricultural use, preventing soil erosion, protection of watersheds, and other related purposes. Shortly after the lands were thus bought, Congress passed the Bankhead-Jones Farm Tenant Act of July 22, 1937, 50 Stat. 522, 525. Section 31 of Title III of that Act directed the Secretary of Agriculture to institute a

broad program of soil erosion prevention, retirement of submarginal lands, etc., purposes such as these lands were acquired for by the Government. Section 32 then provided that, in furtherance of such aims, the Secretary could acquire necessary lands by purchase, gift, devise, or by transfer from any agency of the United States. Accordingly, lands already acquired for such purposes were specifically designated for administration by the Secretary of Agriculture for the purposes outlined in Title III of the Bankhead-Jones Act.[1]

Section 32 of this Act further provided that the Secretary of Agriculture could sell, lease, or otherwise dispose of any property so acquired, but only to public authorities and agencies, and only on condition that the property be used for public purposes. Pursuant to such authority the Secretary in 1940 entered into a 50-year licensing agreement with the Oregon State Highway Commission which authorized the Commission to remove stone, gravel and other materials from the area for use in construction upon or in connection with the property. Eleven years later petitioner purported to make a placer mining entry upon the land under 30 U.S.C. 22, which allows mineral entries on "lands belonging to the United States."

The trial court rendered an opinion (R. 16-19) holding that, upon reacquisition, the 20 acres did not revert to the public domain and are held by the Government solely for the purposes of the Bank-

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[1] Executive Order No. 7908, June 9, 1938, 3 F.R. 1389.

head-Jones Act, that neither that Act nor the 1935 Act under which the land was acquired permits entry or location of mineral claims, and that the land was therefore not open to such entry. The Court of Appeals for the Ninth Circuit affirmed (R. 73-78) on the grounds that the mineral laws apply only to public domain, that lands acquired for specific purposes do not without more revert to the public domain and become subject to mineral entry, that there has been no action by the Government changing this situation, and that the minerals contained in the land and sought by petitioner had been validly disposed of to the State of Oregon long before petitioner attempted to initiate any claim.

ARGUMENT

The foregoing recital of the facts demonstrates fully the lack of merit in petitioner's case. Assuming, *arguendo,* that the lands in question were at any time after repurchase by the Government subject to entry under the mineral laws, it is too clear for argument that they were not so in 1951 when petitioner made his purported mineral entry, for when petitioner made his entry Congress had already taken action inconsistent with any right of petitioner to enter those lands under the mineral laws.

Congress alone can dispose of property of the United States. And if the mineral laws were at any time after 1937 applicable to these lands, it was only because Congress had made them applicable. Hence, assuming that the mineral laws

were applicable, Congress could, as it did here, properly remove the lands from reach of the mineral laws at any time, provided no rights had previously been vested under such laws. And there were no such vested rights here.

It is thus apparent that the dedication of these lands to the purposes for which the Emergency Relief Appropriations Act of 1935 and the Bankhead-Jones Farm Tenant Act were passed, and the licensing of the Oregon State Highway Commission to remove the cinders to which petitioner makes claim, were fully authorized by Congress and are thus valid. In the circumstances, it is clear that on no possible basis can petitioner's contentions be sustained.[2]

While the above ground is plainly dispositive of the case, the other conclusions of the court of appeals are equally correct. That court's holding that the mineral laws extend only to lands of the public domain is, as the court itself points out (R. 74-75), sustained by the legislative history of the statute (30 U.S.C. 22) and by this Court's decision in *Oklahoma* v. *Texas*, 258 U.S. 574, 599-600. Petitioner's contention (Pet. 7) that these lands

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[2] It may be noted that in 1946 the authority of the Secretary of Agriculture over such lands was changed, and that the Secretary of the Interior was given future control of minerals, provided the Secretary of Agriculture should find that disposition of minerals would not interfere with the primary purposes for which the land was acquired. Sec. 402 Reorganization Plan No. 3 of 1946, 60 Stat. 1097, 1099. This, of course, had no effect on the validity of the agreement concluded by the Secretary of Agriculture with Oregon in 1940.

are subject to the mineral laws as "lands belonging to the United States" within the meaning of 30 U.S.C. 22, because they are lands *owned* by the United States, is identically the contention disposed of in the *Oklahoma* v. *Texas* decision where this Court, after noting that under such a construction the lands of the Capitol in Washington and other federal lands such as national cemeteries and parks would be subject to mineral entry, stated that (258 U.S. at p. 600): "Only where the United States has indicated that the lands are held for disposal under the land laws does the section apply; and it never applies where the United States directs that disposal be only under other laws."[3] Here, Congress has never directed that these and other lands so acquired be subject to disposal under the land laws; on the contrary, as previously noted, it has expressly subjected them to disposition only under the Bankhead-Jones Act, and then only to public authorities for public purposes.

The same fundamental fallacy underlies petitioner's reliance (Pet. 2, 11-15) on Executive Order No. 7672, July 19, 1937, 2 F.R. 1263. This Order (R. 74-75), as the court of appeals points out (R.

[3] Petitioner tacitly admits (Pet. 7-8) that the words "lands belonging to the United States" as used in the 1872 Act and the term "public domain" as used in the predecessor 1866 Act, are equivalent, and his suggestion that this means that the term "public domain" in the earlier act meant any lands belonging to the United States and thus included *all* lands of the United States is without significance. Nor is the broad and fundamental character of this Court's pronouncement in *Oklahoma* v. *Texas* affected by petitioner's observation (Pet. 8) that the case "does not involve reacquired land."

76), specifically related only to "public lands" of the United States, and for the same reasons that the reacquired lands are not subject to the mineral laws, they are not within the coverage of Executive Order 7672. Consequently that Order is irrelevant. Similarly the Attorney General's opinion (40 Op. A.G. 73), cited by petitioner (Pet. 12), deals only with public lands of the United States.[4]

Finally, the court of appeals, noting (R. 77) that an intent can not be imputed to the Executive, from a mere withdrawal of *public land,* to open to mineral entry acquired land not subject to entry in the absence of the withdrawal order, observed that "Authority in the executive to do that would be absent even if the result were intended." This is of course correct, since the President has no inherent power by Executive Order or otherwise to dispose of property of the United States. *Sioux Tribe* v. *United States,* 316 U. S. 317, 326. To this may be added that even if authority to dispose of these lands under the mining laws had been expressly given the Executive, the action of

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[4] Presumably to lend an air of magnitude to the instant case, petitioner lists numerous similar Executive Orders withdrawing lands. But these, like Executive Order 7672, dealt only with public lands of the United States, are irrelevant here, and have no tendency to demonstrate that a serious problem as to acquired lands is presented. The contrary is true. As petitioner himself notes (Pet. 7), this is apparently the first case of its kind, which establishes that through the years, since these and other lands were acquired, petitioner alone has entertained the notion that mineral entry could be made upon them.

Congress in the Bankhead-Jones Act in directing a disposition only under that law would have revoked the power years before petitioner made any claim, and obviously petitioner could not have qualified to take such lands under the Bankhead-Jones Act.

CONCLUSION

The decision of the court below is clearly correct and further review is not warranted. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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NO. 526

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OCTOBER TERM, 1955

SAM D. RAWSON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

POINT 1: The License Agreement with the State of Oregon has a clause expressly recognizing that it does not affect Executive Order No. 7672.

ARGUMENT

Respondent implies that the Licensing Agreement with the State of Oregon prevents petitioner from prevailing on the merits. D. Ex. 6, R. 59; Resp. Br. 3, 5.

This exhibit was introduced by petitioner and expressly provides:

> "It is provided, however, insofar as the land subject to this agreement consists of public domain reserved for use in connection with the project by Executive Order No. 7672, dated July 19, 1937, that nothing in this agreement shall be construed to restrict the disposition of mineral resources contained in such lands under the public land laws of the United States." (p. 4) D. Ex. 6; R. 59

The draftsman of the Licensing Agreement failed to follow the precise wording of the following proviso in Section 2 of Executive Order No. 7672:

> "Provided, that nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of the lands under the applicable laws." Petition 21; July 19, 1939, 2 F.R. 1511

However, it is clear that this is the provision to which he refers and his substitution of the words "public domain" for the words "the lands" cannot change the meaning of the President's order.

Since it appears from the surrounding circumstances that the draftsman of the lease was using the phrase "public domain" for the words "the lands" found in Executive Order No. 7672, the question of the meaning of the phrase "public domain" turns upon the meaning of the phrase "the lands" found in Executive Order No. 7672. The land involved here is admittedly acquired land. R. 5. It is described in Executive Order No. 7672. R. 6. At the time the order was issued, there was no land which had never been patented left in Section 13 where the land here involved is located. R. 32, 45. The

proviso in the order allowing mineral entry then applies to this land. Consequently, the phrase "the lands" in the proviso does not mean "public land which had never been patented". It follows then that the phrase "public domain" as used by the draftsman of the Licensing Agreement means simply "government-owned land".

The Court of Appeals assumed that the use of the phrase "public domain" in the License Agreement excluded acquired lands. Petition 36. In Barker v. Harvey, 181 U.S. 481, 490 (1901), this court said:

> " 'Public domain' is equivalent to 'public lands', and these words have acquired a settled meaning in the legislation of this country. 'The words "public lands" are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws.' "

If this definition is inserted in the License Agreement, the basic question for decision still remains: are acquired lands "subject to sale or other disposal under general laws"? This question and not the matter of the License Agreement or the Bankhead-Jones Farm Tenant Act, 50 Stat. 522, 525, as amended 56 Stat. 725, 7 U.S.C. sec. 1010 *et seq.*, were properly regarded by the Court of Appeals as the controlling question:

> "The controlling question in this case is whether land purchased by the United States for a specific purpose is open to location under the general mining laws." 225 F. 2d 855, 856; Petition 30

POINT 2. The land here involved was not purchased under the authority of the Bankhead-Jones Farm Tenant Act, and any transfer of the land for administration under that Act was subject to the reservation stated in Executive Order No. 7672.

ARGUMENT

Here the land was purchased under the authority of the Emergency Relief Appropriations Act of 1935, 49 Stat. 115, 118, and the Act of August 24, 1935, 49 Stat. 750, 781. R. 9. It was purchased prior to the enactment of the Bankhead-Jones Farm Tenant Act, 50 Stat. 522, 525, as amended 56 Stat. 725, 7 U.S.C. sec. 1010 *et seq.* R. 4-5. By that Act Congress merely authorized, and did not direct transfer to the Secretary of Agriculture of land already owned by the United States. 50 Stat. 522, 526, 7 U.S.C. sec. 1010(a). However, respondent suggests that this land was transferred by the President by Executive Order No. 7908, June 9, 1938, 3 F.R. 1389, for administration by the Secretary of Agriculture for purposes outlined in Title III of the Bankhead-Jones Act. Resp. Br. 3, 6.

An examination of Executive Order No. 7908 will show that it does not revoke Executive Order No. 7672. Yet such revocations appear to be universal practice when an executive order is superseded or revoked. There is conclusive evidence in the record that the Secretary of Agriculture to whom the land was transferred for administration regarded Executive Order No. 7672 as still in force. D. Ex. 6, p. 4; R. 59.

In short, despite the fact that the Licensing Agreement recites that the Secretary of Agriculture was acting under Title III of the Bankhead-Jones Farm Tenant Act and despite the fact the agreement was made in 1940, about two years after Executive Order No. 7908 was issued, the Secretary of Agriculture inserted in the Licensing Agreement the provision which has been quoted above recognizing that Executive Order No. 7672 was still in force so far as the disposition of the mineral resources of the lands were concerned.

Any transfer of this land to the Secretary of Agriculture for Bankhead-Jones Act administration was then a qualified transfer since Executive Order No. 7672 admittedly remained in force. The Bankhead-Jones Act, 50 Stat. 522, 526, 7 U.S.C. sec. 1011(a), provides that property may be acquired "by transfer from any agency of the United States" and that "such property may be acquired subject to any *reservations*, outstanding estates, interests, easements, or other encumbrances which the Secretary determines will not interfere with the utilization of such property." (Emphasis supplied) See Petition for full text. Petition 22-23.

Since Executive Order No. 7672 created a reservation, and since it was not revoked by the President when he issued Executive Order No. 7908, the Secretary of Agriculture took over administration of the land subject to the existing reservation. That existing reservation provided for mineral entry. (See text of Executive Order No. 7672. Petition 20.) The Secretary of Agriculture expressly recognized this in the License

Agreement with the State of Oregon. D. Ex. 6, p. 4; R. 59. It then follows that the land here involved was as open to entry in 1951 as it was on July 19, 1937, when the order was issued.

POINT 3: In this case the President had power to open the land to mineral entry by virtue of Congressional delegation of power to him by various statutes and he did open it.

ARGUMENT

The question whether or not this land was open to mineral entry in 1951 depends upon the applicable statutes. This land was bought prior to the enactment of the Bankhead-Jones Farm Tenant Act, 50 Stat. 522, 525, 7 U.S.C. sec. 1010 *et seq.*; that Act is not controlling here since any transfer for administration under it was subject to the reservation contained in Executive Order No. 7672.

It was, however, an agreed fact that:

> "The President had authority under said Emergency Relief Appropriations Act of 1935 and under the Act of August 24, 1935, (49 Stat. 115) to make disposition of all of said lands including Section 13 as was made by said Executive Order (No. 7672)". R. 9

An examination of those statutes will show that Congress did give the President sweeping power of disposition over the lands acquired under the authority of those laws.

Neither the Court of Appeals nor the respondent make any reference to the fact the President chose to exercise that broad power of disposition by issuing Executive Order No. 7672 under the Pickett Act, 36 Stat. 847, as amended, 37 Stat. 497, 43 U.S.C. sec. 141-143. The Pickett Act by its express terms requires that lands

withdrawn by use of it remain open to mineral entry.

This requirement was one of the main bases of an opinion by the Attorney-General, 40 Op. A.G. 73, where he stated that if the President acts under the Pickett Act the lands so withdrawn remain open to mineral entry while if he acts under his inherent withdrawal powers, they do not. There is no basis in that opinion, nor is any cited by respondent for concluding, as respondent claims, that the opinion was to be restricted in application to public lands which had never been patented. Resp. Br. 7.

The opinion of the Attorney-General comprehensively reviews the whole question of the exercise of the withdrawal powers of the President involving hundreds of executive orders and states a simple and understandable rule. Undoubtedly hundreds more executive orders have been drawn since the opinion upon the basis of the distinction made by the Attorney-General.

Respondent misunderstands petitioner's reasons for citing many executive orders which are identical in general form with Executive Order No. 7672 which is here involved. Resp. Br. 7; Petition 11-13. Petitioner does not have the facilities to obtain information to dispute respondent's unsupported assertion that those executive orders do not involve acquired lands. Resp. Br. 7. Leaving that to one side, the point petitioner makes and which respondent misunderstands is simply this: the respondent, in effect, says that Executive Order No. 7672 does not recognize any right of mineral entry on certain land legally described therein although the order

was issued under the authority of the Pickett Act; if that is true, the same language and the same authority used in all the listed executive orders is equally meaningless and no one can rely upon the text of such executive orders in locating a miner claim. Consequently, this is an important case having application to the construction of probably hundreds of executive orders.

POINT 4: These reacquired lands were "lands belonging to the United States" within the meaning of the mining laws of the United States.

ARGUMENT

Apart and aside from any powers granted to the President under the Emergency Relief Appropriations Act of 1935, the Act of August 24, 1935, and the Pickett Act to make a disposal of the minerals in this land, petitioner can still prevail upon the basis of the mining laws of the United States. R.S. sec. 2319, as amended, 41 Stat. 437, 30 U.S.C. sec. 22.

The decision in Oklahoma v. Texas, 258 U.S. 574 (1922), not only does not deal with reacquired lands, but deals with a special statutory situation in which Oklahoma, Indian Territory, had been treated as a special case so far as the mining laws of the United States were concerned. (pp. 600-601) In this particular case, the United States has never directed that the disposal of the land here involved be under other laws than the mining laws. Congress simply directed that these submarginal lands be retired from agriculture; it did not direct that they be acquired for use as a national park or as a post office site. Act of Aug. 24, 1935, 49 Stat. 750, 781; Petition 19.

Lands such as military reservations are not open to mineral entry, in any case, because of the nature of the withdrawal order, express or implied, setting aside lands for such uses. The President is better equipped than the courts to determine whether or not mineral entry is consistent with the best interests of the United States.

Here the President has decided that mineral entry is appropriate. Executive Order No. 7672. The Court of Appeals makes mineral entry depend upon the legal accident as to how the United States happened to acquire title to the land. 225 F. 2d 855, 858; Petition 35.

As has been pointed out in detail in the petition, Congress has not made any such distinction. Petition 7-11. Furthermore, the result of such a distinction is unfortunate for the administration of the government lands because then identical tracts of sagebrush and hardpan lying side by side in the same project will be open to mineral entry or not depending upon the accidental fact that one tract may have homesteaded and patented and then retired from agriculture and the other abutting tract never patented.

SUMMARY STATEMENT OF REASONS FOR GRANTING CERTIORARI

Respondent concedes that this is a case of the first impression. Resp. Br. 7. Respondent does not deny that the administration of millions of acres of reacquired land will be affected by the decision of the Court of Appeals not only under the mining laws of the United States but under the United States land laws generally. This case also will have an important effect on every land case where a withdrawal order has been issued under the authority of the Pickett Act, 36 Stat. 847, as amended, 37 Stat. 497, 43 U.S.C. sec. 141-143.

CONCLUSION

For the foregoing reasons the petition for certiorari should be granted.

Respectfully submitted,

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